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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1839

ASARCO INCORPORATED (formerly The American Smelting and Refining Company),

Appellant,

v.

IDAHO STATE TAX COMMISSION

Appellee

ON APPEAL FROM THE
SUPREME COURT OF IDAHO

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Multistate Tax Commission (Commission) and the participating states, listed in the attached Brief, respectfully move for leave to file the attached Brief *Amicus Curiae* in this case. The consent of the attorney for the Appellee has been obtained. The consent of the Appellant has been requested but at the time of the writing of this motion has not been granted.

The interest of the Commission is as shown in the "Statement of Interest" section of the attached Brief. Additionally, this case concerns the constitutionality of the Uniform Division of Income for Tax Purposes Act which is part of the substantive law of all states adopting the Multistate Tax Compact. The Commission appeared as *Amicus Curiae* before the Idaho Supreme Court in this case, and the original tax audit upon which this case is based was conducted by the Commission's audit staff.

Respectfully submitted,

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ON APPEAL FROM THE
SUPREME COURT OF IDAHO

BRIEF OF MULTISTATE TAX COMMISSION AND PARTICIPATING STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEE'S MOTION TO DISMISS OR AFFIRM

I. INTRODUCTORY STATEMENT

This brief is submitted by the Multistate Tax Commission and the participating states, listed herein, in support of Appellee's Motion to Dismiss or Affirm.

II. STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter referred to as the Commission) is the official administrative agency of the Multistate Tax Compact (hereinafter referred to as the Compact) entered into currently by 19 states as full members, including Idaho, and by 12 states as associate members.[1]

The purposes of the compact are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicate taxation.[2]

[1]The current regular members are the states of Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The associate members are the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania, Tennessee, and West Virginia. (Ninth Annual Report, Multistate Tax Commission, June 30, 1976)

[2]The constitutionality of the Compact was upheld by the United States Supreme Court in *U.S. Steel, et al. v. Multistate Tax Commission, et al.*, 434 U.S. 452 (1978), affirming 417 F. Supp. 795 (S.D.N.Y. 1976). The Court there noted that the Compact ". . . symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer."

In fulfillment of these objectives in the area of state income taxation of multistate-multinational business, Article IV of the Compact sets forth the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA).[3] Its purpose is to provide for the uniform allocation and apportionment of income for state income tax purposes by those states that adopted it. It has been adopted by a great majority of the income tax states. (11th Annual Report of the Multistate Tax Commission, 1977-1978, App. B pg. 28). It applies to all classes of taxpayers (individuals, partnerships, etc.) except financial institutions and public utilities. It provides for the specific allocation or apportionment of all the income of all the included taxpayers except the personal service income of individuals. UDITPA apportions "business income" in accordance with the well-recognized three-factor apportionment formula of property, payroll and sales. "Nonbusiness income" is specifically allocated as provided for therein.[4]

Pursuant to its authority under Article VII of the Compact, the Commission approved revised uniform allocation and apportionment regulations on February 21, 1973, which implement UDITPA. Idaho and approximately 17 other states have adopted these regulations substantially in the form as adopted by the

[3]UDITPA was promulgated by the National Conference of Commissioners on Uniform State Laws in 1957. Uniform Laws Annotated, Vol. 9A, p. 448, et seq.

[4]Section 1A of UDITPA defines "business income" as:

> [I]ncome arising from transactions and activities in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

Section 1E defines nonbusiness income subject to specific allocation as "all income other than business income."

Commission.[5] These regulations embody an interpretation of the language of UDITPA.

In the instant case, the Idaho Supreme Court, in construing what constituted business income subject to apportionment under the Idaho UDITPA provisions defining business income applied a more restrictive interpretation of what constituted apportionable income thereunder, than required by the unitary apportionment decisions of this Court. It included in apportionable income, *only income from those "investments" of ASARCO which ASARCO had specifically made to expand its principal non-ferrous metals, exploration, mining, smelting and refining business which it conducted in part in Idaho.*

Notwithstanding the unequivocal holdings of this Court, ASARCO nevertheless argues that it is entitled to "separately account" for and subtract from its unitary income subject to apportionment under UDITPA the gross income from its intangible properties if certain of its specified activities associated with those properties are not located in the taxing state.[6]

What ASARCO fails to realize is that "separate accounting" ("sourcing") of income or domicillary issues

[5]Results of a survey on the Uniformity of State Laws by the State of Indiana dated February 15, 1977.

[6]ASARCO assumes in its statement of questions that it is unconstitutional for Idaho to include ASARCO's income from intangible properties in apportionable income because (1) its commercial and legal domicile is not in Idaho; (2) the payors of the dividend income are not located in Idaho; (3) its intangibles are physically located outside of Idaho; (4) its activities in regard to its intangibles are conducted outside of Idaho; and (5) the income from its intangibles is not needed to provide operating capital for its mining operations in Idaho. ASARCO does not contend that the income from its intangible properties and its intangible properties were not utilized by it in its unitary business operations both within and without Idaho. Nor does it contend that this income is not properly classified as "business income" under Section 1(a) of UDITPA.

are inconsistent with and irrelevant in determining the validity of the assignment of unitary income to a particular taxing jurisdiction by an apportionment formula. The whole purpose of the UDITPA and other apportionment formulae is to determine what income or property of a unitary trade or business can be attributable to the taxing state, irrespective of the specific situs of the property or the specific location of the income-producing activities or "sources" and expenses related thereto.

ASARCO's error can be illustrated by a brief analysis of ASARCO's "reasons for noting jurisdiction" (Jur. St., pp. 9-20), as well as its Statement of Questions Presented (Jur. St., pp. 4-5). In ASARCO's "Statement of Questions Presented," if the word "dividends" is deleted and there is substituted therefor "smelting income," it would not change the nature of the questions presented or ASARCO's argument one *iota*. This follows from the simple proposition that ASARCO conducted no smelting activities in Idaho and that such smelting activities and properties and gross receipts connected therewith are undoubtedly managed, controlled and physically located outside of Idaho and the income is received from "sources" foreign to its activities in Idaho. Thus, ASARCO is arguing that only income which is derived from its Idaho activities and utilized in its Idaho activities can be includable in apportionable income within the purview of commerce clause and due process limitations of the United States Constitution. Such argument makes no sense whatsoever.

The reason for inclusion of ASARCO's income from its smelting properties and activities and expenses re-

lated thereto in determining net income subject to apportionment to Idaho is simply because its smelting activities and properties are used in conjunction with a unitary business which it carries on in part within the state of Idaho. Exactly the same factual and constitutional considerations come into play when the question is a determination of whether income from intangible properties, whether it is dividends, interest or capital gains from the sale of stock and securities, is properly includable in apportionable income.

This is further illustrated by ASARCO's statement on page 9 of its Jurisdictional Statement that this case involves the substantial federal question of "whether a state may constitutionally tax dividends paid to a resident corporation out of foreign source earnings of nonresident corporations having no contact with the taxing state." While it is difficult to understand what ASARCO means by such an "issue," it is evident that it is predicated on the proposition that Idaho is imposing a tax on ASARCO's dividends. Idaho is no more imposing a tax on ASARCO's "dividends" than it is imposing a tax on ASARCO's income from its smelting and refining activities which are not conducted by ASARCO in Idaho.

The issue in this case, then, is not as stated under headings (1), (2) and (3), on pages 9, 14, and 18, respectively, of ASARCO's Jurisdictional Statement, namely, the constitutionality of state taxation of dividends and other income from intangible properties. The sole question at issue here is the ability of the states, within constitutional limitations, to include in apportionable income, all income from a business which is conducted both within and without the taxing

state to the extent that the income arises from transactions and activities in the regular course of the business, including income from intangible property if the acquisition, management and disposition of the property constitutes integral parts of the business.

It is important that the UDITPA provisions be interpreted to carry out the purpose of the 29 states, including Idaho, in adopting the uniform allocation and apportionment rules continued therein. This purpose is to provide for uniformity and full accountability (without duplication) in the division of income for state income tax purposes by workable and rational division of income rules.[7]

The Commission and participating states are concerned with the proposition advanced by ASARCO that dividends and other income from business related intangible property, under the United States Constitution, must be arbitrarily assigned for state income tax attribution purposes to the commercial domicile or to the location of the payors of the income, rather than to where the taxpayer utilizes these intangible properties and the income derived therefrom in conducting its unitary activities, as required by a reasonable interpretation and application of the definition of "business income" in UDITPA.

Because ASARCO's arguments have been conclusively foreclosed and rejected by prior decisions of this Court and are based on factual conclusions not supported by the record or the findings of the Idaho Su-

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[7]Prefatory note to UDITPA, Uniform Laws Annotated, Vol. 9A, p. 448; *GTE Automatic Electric v. Allpin*, 68 Ill.2d 326, 369 N.E.2d 841 (1977) and Pierce, "The Uniform Division of Income for State Tax Purposes," 35 Taxes 747 at 748 and 749 (1957).

preme Court, we respectfully submit that ASARCO has presented no substantial federal question. For this reason, as more fully set forth herein, this Court should dismiss this appeal, or in the alternative, affirm the decision below for want of a substantial federal question.

III. COUNTER-STATEMENT OF QUESTION PRESENTED.

The statement of questions presented by ASARCO is based on erroneous factual assumptions and on a misconception of the legal issues posed. (Jur. St., pp. 4-5)

The only question presented is as follows:

Are the Idaho UDITPA provisions consistent with the due process and commerce clauses of the Constitution of the United States, to the extent these provisions include in apportionable income all "business income" defined as:

> ". . . income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitute integral or necessary parts of the taxpayer's trade or business operations." Idaho Code §63-3027.[8]

[8]While the Idaho definition of "business income" is not identical with the definition of "business income" contained in Section 1(a) of UDITPA, and the Idaho law employs a statutory presumption, we believe that this difference is of no constitutional significance. UDITPA defines business income as:

> ". . . income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

Contrary to ASARCO's argument (Jur. St., pp. 9, 12, 21), the present case does not present the same case as is before this Court in *Mobil Oil Corporation v. Commissioner of Taxes of Vermont,* October Term, 1979, No. 78-1201.

In its Jurisdictional Statement and brief in Docket No. 78-1201, Mobil argued that ". . . There is no Connection Between its Business, Property or Operations in Vermont and the Foreign Source Dividends Taxed" (Docket No. 78-1201; Mobil's Jur. St., p. 9; Mobils Brief, p. 9) and that "all transactions and all of Appellant's [Mobil's] activities and operations having to do with the stocks and the dividends at issue were entirely disassociated from Appellant's business in Vermont." (Ibid., p.10). While we do not believe that Mobil in Docket No. 78-1201 has sustained its burden of establishing that its dividends and other income from intangibles arose from "investments" unrelated to its Vermont business operations, activities or privileges, there can be no question in this regard on the present appeal. As set out below and held by the Idaho Supreme Court, the record in the instant case establishes a definite connection between ASARCO's stockholdings on which the dividends in question were paid and its unitary business which it conducted in part in Idaho. That being true, a fair apportionment of ASARCO's business income, including its dividends in question, to its activities within the State of Idaho raises no substantial constitutional question. If anything is settled by the decisions of this Court, it is that the unitary income of a unitary business, conducted in part in the taxing state, can be apportioned by the well recognized three-factor UDITPA apportionment formula.

IV. STATEMENT OF THE CASE.[9]

ASARCO is a multistate-multinational corporation "in the business of mining of copper and non-ferrous metals, gold, silver, copper, lead, zinc and asbestos, and in smelting and refining and selling these metals and in the sale of secondary metals." (Juris. St., p. 36)

Its "principal business in Idaho is from mining of silver; it also mines lead and zinc, operates an administrative office for its northwest mining division and sells secondary metals in Idaho." (Juris. St., p. 39)

ASARCO's ores from its Idaho mining operations are shipped to its smelters outside of Idaho for further processing. (App. Juris, St., pp. 37-38)

ASARCO was also engaged in exploration activities in Idaho which resulted in substantial development and exploration expenditures. (Rptr. Tr., p. 146-147)

ASARCO reported its income under the provisions of UDITPA on the basis that it conducted a unitary business both within and without Idaho.

ASARCO did not contend at the time it filed its Idaho income tax returns that its mining, exploration and administrative operations which it conducted in part in Idaho were not an integral part of its business overall operations conducted in part in Idaho.

In determining its taxable income for Idaho income tax purposes under UDITPA, ASARCO excluded from net income subject to apportionment to Idaho the gross amount of all its income from all its intangible properties (including the gross amount of its interest income,

[9]The facts set forth in this statement refer to the tax years 1968, 1969 and 1970 in question unless otherwise indicated.

dividend income, royalty income and income derived from gains from the disposition of stocks and other intangibles) and gross income from the rental of housing to its mining employees. Notwithstanding this exclusion ASARCO determined its net income subject to apportionment by deducting all of its expenses which it deducted for federal income tax purposes. These deductions would include all *overhead, headquarters* and *interest* expenses, as well as depletion and depreciation deductions, etc. ASARCO also included *all* of its property, payroll and sales in the denominators of the Idaho apportionment formula factors. Nor did it contend that its stock on which the dividends were paid had not been acquired and used by it in the furtherance of its unitary business operations both within and without Idaho. In fact, apart from contending that it "has sufficient cash flow from mining to provide operating capital for all mining operations without reliance upon cash flow from smelting, refining, sale of secondary metals or income from intangibles," (App. Juris. St., p. 38), ASARCO does not otherwise contend that the income in question was not used for the furtherance of its unitary trade or business both within and without Idaho.

While the Supreme Court of Idaho recognized that "in a sense all investments and investment income of a corporation may benefit a corporation's business operations in that the investments may supply additional revenue for operating the trade or business, may improve the corporation's standing and financial posture, and in general may permit the corporation to conduct its regular business activities in a way it could not absent those investments" (App. Jur. St., p. 12), it did

not, for these reasons alone, conclude that ASARCO's income in question constituted "business" income under UDIPTA. In interpreting what constitutes "business income" from intangibles subject to apportionment under the Idaho UDITPA language the Supreme Court of Idaho determined that it was necessary to further tie the stockholdings to ASARCO's unitary business.

In regard to the dividend income held to constitute "business income," the Supreme Court of Idaho, based on the facts concerning the relationship of ASARCO's business activities with that of Southern Peru Copper Corp., M.I.M. Holdings, Ltd., General Cable, Revere Copper, ASARCO Mexicana S.A. and Compania American Smelting S.A., held as follows:

> "With respect to the dividends ASARCO received from Southern Peru Copper Corp.; M.I.M. Holdings, Ltd.; General Cable; Revere Copper; ASARCO Mexicana, S.A.; and Compania American Smelting, S.A., we conclude that the record does not contain clear and convincing evidence to rebut the statutory presumption and does not support the trial court's finding that those dividends were not business income. For the years in question, ASARCO owned a controlling or at least a very substantial interest in each of these corporations. They are all engaged in businesses closely related to ASARCO's mining and smelting operations and, with the exception of M.I.M., ASARCO did a substantial amount of business with them and provided them with a variety of technical services. *The clear inference from these facts is that ASARCO's interest in these companies was not merely that of a passive investor but that this*

> *dividend income arises from ASARCO's mining and smelting business and that ASARCO acquired and maintained its ownership interest in these companies as an integral and necessary part of its mining and smelting business.* (App. Juris. St., pp. 19-20; emphasis added)

In applying the same standard of what constitutes "business" income under UDITPA, the Court found (1) that various other stock investments of ASARCO did not produce business income; and (2) that ASARCO's interest income, rents, royalties and capital gains and losses constituted business income. (App. Jur. St., pp. 4-8)

The only issue in this appeal is whether the Supreme Court of Idaho has interpreted and applied the Idaho UDITPA provisions in a constitutional manner.

V. THE ARGUMENT.

ASARCO Has Presented No Substantial Federal Question Inasmuch As Section 1 (a) of UDITPA as Interpreted and Applied by the Idaho Supreme Court is Clearly Constitutional Under Repeated Decisions of this Court.

Decisions of this Court have uniformily sustained the apportionment of *all* the unitary income of a unitary trade or business by the taxing state when the trade or business is carried on in part in the taxing state.[10]

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[10] *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194 (1896), rehearing 166 U.S. 185 (1897); *Butler Bros. v. McColgan*, 315 U.S. 501 (1942); *Bass, Ratcliff & Gretton v. State Tax Comm.* 266 U.S. 271 (1924); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 540 (1959); *United States Steel Corp., et al. v. Multistate Tax Commission*, 434 U.S. 452 (1978); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940); *General Motors Corp. v. District of Columbia*, 380 U.S. 553 (1965); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978).

The only relevant question when an apportionment formula is challenged under such circumstances is whether the apportionment formula arrives at a reasonable result and is not shown by the taxpayer by clear and cogent evidence to reach extra-territorial income or values. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).[11]

The unitary concept or unit rule of taxation has been uniformly followed by the states under the clear mandate of controlling decisions of this Court, whether the cases involve corporate franchise, income or property taxes.[12]

This position has been uniformly supported by various commentators.[13]

The unitary concept, which is embodied in the "business income" definition contained in Section 1(a) of UDITPA, arose out of the necessity to divide a tax base attributable to multistate activities equitably among tax jurisdictions. It evolved as a judicial concept to con-

[11]In fact, this was the only constitutional issue raised by ASARCO in the Idaho Courts. It was the only constitutional issue decided by the Idaho Supreme Court. In an effort to prove that the UDITPA formula arrived at an unreasonable result, ASARCO relied solely on "separate accounting." (App. Jur. St., pp. 28-29)

[12]

California

Butler Bros. v. McColgan, 17 Cal.2d 664, 111 P.2d 3334 (1941)

Superior Oil Co. v. Franchise Tax Bd., 60 Cal.2d 406, 386 P.2d 33 (1963)

Honolulu Oil Corp. v. Franchise Tax Bd., 34 Cal. Rptr. 552, 386 P.2d 480 (1953)

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Albany International v. Halperin, 388 A2d. 209 (1978)

Maryland

Comptroller of the Treasury, Income Tax Division v. Diebold, Inc., Court of Appeals of Maryland No. 112, Sept. Term 1976, Opinion filed Feb. 9, 1977

Michigan

Cleveland Cliffs Iron Co. v. Corporation Securities Comm., 351 Mich. 652, 88 N.W.2d 564 (1958)

Vermont

Gulf Oil Corp. v. Morrison, 120 Vt. 324, 141 A.2d 671 (1958)

F. W. Woolworth Co. v. Commissioners of Taxes, 130 Vt. 544, 298 A.2d 839 (1972)

New Jersey

F. W. Woolworth Co. v. Director of Taxation, 45 N.J. 466, 213 A.2d 1 (1965)

Montana

Montana Department of Revenue v. ASARCO, Mont. , 567 P.2d 901 (1977)

New Hampshire

Johns-Manville Products Corp. v. Commissioner of Revenue Administration, 115 N.H. 428, 343 A.2d 221 (1975)

New Mexico

Champion International Corp. v. Bureau of Revenue, 88 N.M. 411, 540 P.2d 1300 (1975)

Arkansas

Qualls v. Montgomery Ward, Supreme Court of Ark., dec'd July 2, 1979.

[13]Keesling and Warren, "The Unitary Concept in the Allocation of Income," 12 Hastings L. J. 42 (1960); Walter Hellerstein, "State Taxation in the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?" 75 Mich. L. R. 1426 (1977); Jerome Hellerstein, "Recent Developments in State Tax Apportionment and a Circumscription of a Unitary Business," XXI National Tax Journal 487; Lavelle, "What Constitutes a Unitary Business," 25 Major Tax Planning (U.S.C. Law Center Institute) 239 (1973); Dexter, "The Unitary concept in State Taxation of Multistate-Multinational Businesses," 10 The Urban Lawyer 188 (1978).

form general statutory requirements to constitutional limitations on state taxing power. It was applied where a portion of a tax base attributable to a particular state could not be determined by "separate accounting" because of the "unitary" or integrated nature of the multistate business's operation both within and without the taxing state.[14]

The "unit" rule ("unitary") concept in the apportionment of a tax base among the states was first applied by this Court in determining the *ad valorem* property tax liability of interstate utilities. *State Railroad Tax Cases,* 92 U.S. 575 (1875) and *Adams Express Co. v. Ohio State Auditor,* 165 U.S. 194 (1896), (*Adams Express, Co. I)* rehearing 166 U.S. 185 (1897) (*Adams Express, Co. II).*

These early cases recognized the unitary nature of an interstate utility system and the validity of the apportionment of the unitary value of the system.

Adams Express Co. I, supra, upheld the apportionment of the full value of interstate express companies, *including the value of their intangible property.* It found that all of the property of an interstate utility system was subject to apportionment to measure the going concern value of tangible personal property physically present in the taxing state.[15]

In *Adams Express Co. II, supra,* this Court rejected the argument that the commercial domicile had a special claim to tax the intangible properties of interstate utilities when these intangible properties were utilized

[14]An Indiana survey indicates that all income tax states apportion unitary income. *Ibid,* note 5.

by the utilities in carrying on their interstate business operations. In so doing, it posed and answered the following question concerning three-fourths of the value of Adams Express which was intangible property:

> "Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, we think, the latter." (166 U.S. 223)[16]

[15]It noted in *Adams Express Co. I:*

> "No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons, and furniture, than that of railroad, telegraph, and sleeping-car companies, to roadbed, rails, and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture, the contracts for transportation facilities, the capital necessary to carry on the business — whether represented in tangible or intangible property — in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the issuance of these companies as the others." (165 U.S. 221, 222)
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> * * * * *
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> "There is here no attempt to tax property having a situs outside of the state, but only to place a just value on that within. Presumptively, all the property of the corporation or company is held and used for the purpose of its business, and the value of its capital stock and bonds is the value of only that property so held and used.
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> * * * * *
>
> "It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all of their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis." (165 U.S. 227)

[16]In *Adams Express II,* this Court further noted:

> "The burden of the contention of the express companies is that they have within the limits of the State certain tangible property, such as horses, wagons, and so forth; that tangible property is the only property within the State; that is must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them."
>
> "This contention practically ignores the existence of intangible property, or at least denies its liability for taxation." (166 U.S. 218)

These early "unit rule" ad valorem utility property tax cases were applied to corporate privilege and income taxes. In applying the "unit rule," to privilege taxes this Court in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911) stated:

> "Nor can it be justly said that investments have no real relationship to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing with shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige." (220 U.S. at 166)

Similarly, in *Ford Motor Co. v. Beauchamp,* 308 U.S. 331 (1939) this Court again recognized that the existence of intangible properties by large multistate-multinational corporations contributed substantially to their business which they conducted in various states in stating:

> "In a unitary enterprise, property outside of the state necessarily affects the worth of the privilege within the state. Financial power inherent in possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. For this reason, it is held that an entrance fee may be properly measured by capital wherever located. The weight, in determining the value of the intrastate privilege, given the property beyond the state's boundaries, is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state." (308 U.S. at 336)

The unit rule of taxation, which included a reasonable apportionment of intangible properties and intangible values, as developed in the *Adams Express Co.* cases was first applied to taxes on or measured by net income in *Underwood Typewriter Co. v. Chamberlain, supra.* In *Underwood,* a tangible property apportionment factor was used to apportion to Connecticut manufacturing activities ". . . income upon which the corporation is required to pay a tax to the United States." (254 U.S. 117, 118) In challenging the constitutionality of the apportionment formula, the taxpayer contended that the net income included income from intangibles not connected with its Connecticut manufacturing business or properties. (254 U.S. 114-116) In disposing of the taxpayer's arguments, this Court focused its attention solely on the validity of the apportionment result.[17]

Four years later, in *Bass, Ratcliff & Gretton, Ltd. v. New York Tax Commission,* 266 U.S. 271 (1924), this Court held that the world-wide property and income of a British unitary enterprise were a necessary part of the apportionment computations in measuring the true value of its income attributable to New York. The taxpayer was found to be "a

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[17]Previously, this Court in *Peck & Co. v. Lowe,* 247 U.S. 165 (1918) had rejected the argument that a tax on net income from export sales constituted a tax on exports. In so doing, it noted that an income tax ". . . is not laid on income from exportation because of its source . . . The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus, what is taxed — the net income — is as far removed from exportation as are articles intended for export before the exportation begins." (247 U.S. 174-175) Compare *Peck* with *Crew Levick Co. v. Penn.*, 245 U.S. 292 (1917) wherein a gross receipts tax on receipts from goods sold in foreign commerce was held invalid.

British corporation, engaged in brewing and selling Bass's ale" which it imported and sold in New York City and Chicago. (id., at p. 278) It had world-wide net income of $2,185,600, but "the Company, as reported to the United States, had no net income upon which it was subject to a federal income tax." (id., at p. 279) New York imposed a 3% tax which Bass paid under protest.

On appeal, Bass contended that the tax was imposed "upon a portion of its net income derived from business carried on outside of the United States . . ." (id., at p. 280) Bass argued further that the New York tax ". . . imposes a direct burden upon its foreign commerce in violation of the commerce clause of the Constitution." (id., at p. 280) This Court decisively rejected these contentions. It held that Bass ". . . carried on the *unitary* business of manufacturing and selling ale, in which its profits were *earned in a series of transactions* beginning with manufacture in England and ending in sales in New York . . ." (id., at p. 282; emphasis added) Having found Bass to be a unitary business operation, this Court affirmed that a fair measuring of taxes due the State required inclusions of:

". . . the property of such corporations beyond its borders to 'get the *true value* of the things within it, when they are part of an organic system of wide extent' giving the local property a value *above that which it would otherwise possess* . . ." (id., at p. 282; emphasis added)

Again, in *Butler Bros. v. McColgan,* 315 U.S. 501, this Court applied the unit rule it had expressed in the *Adams Express Co.* cases and its observations in

Flint v. Stone Tracy Co., supra, and *Ford Motor Co. v. Beauchamp, supra,* in determining the validity of the apportionment result challenged in *Butler Bros.* It there found:

"One who attacks a formula of apportionment carries the distinct burden of showing by 'clear and cogent evidence' that it results in extra-territorial values being taxed. See *Norfolk & Western Ry. Co. v. North Carolina,* 297 U.S. 682, 688, 56 S. Ct. 625

* * * * *

"At least since *Adams Express Co. v. Ohio,* 165 U.S. 194, 17 S. Ct. 305, this Court has recognized that the unity of use and management of a business which is scattered through several States may be considered when a State attempts to impose a tax on an apportionment basis.

* * * * *

"We cannot say that property, payroll, and sales are inappropriate ingredients of an apportionment formula. We agree with the Supreme Court of California that *these factors may properly be deemed to reflect 'the relative contribution of the activities in the various states to the production of the total unitary income,' so as to allocate to California its just proportion of the profits earned from this unitary business. And no showing has been made that income unconnected with the unitary business has been used in the formula." (Emphasis added, 315 U.S. 507-508)*

In *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 (1978), this Court stated:

"The 'unitary business' technique involves calculating a corporate taxpayer's net income on the basis of

all phases of the operation of a single enterprise (*e.g.*, production of components, assembly, packing, distribution, sales), *even if located outside the jurisdiction*. The portion of that income attributable to activities within the taxing State is then determined by means of an apportionment formula. See, *e.g.*, *Underwood Typewriter Co. v. Chamberlain,* 254 U.S. 113 (1920). (footnote 25, 434 U.S. 473; emphasis added)

* * * * *

"Individual States are free to employ the unitary-business standard. *Underwood Typewriter Co. v. Chamberlain, supra;* accord, *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n,* 266 U.S. 271 (1924)." (footnote 26, 434 U.S. 474)

The clear holding and import of the foregoing cases has in substance been codified by the allocation and apportionment rules contained in UDITPA. Thus, UDITPA defines income subject to apportionment as income derived by the taxpayer from: (1) transactions and activities in the regular course of the taxpayer's business; and (2) including income from tangible and intangible properties "if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations."[18] This unitary income under UDITPA is then apportioned by the well-recognized, generally accepted three-factor formula of property, payroll and sales.

This is exemplified by the state court decisions (including the decision below) in determining what constitutes "business income" subject to apportionment under UDITPA.[19]

[18]Regulation IV. 1(a) of the Commission sets forth the following standard to determine what constitutes business income under UDITPA and thus subject to UDITPA's apportionment provisions:

> The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, nonoperating income, etc., is of no aid in determining whether income is business or nonbusiness income. Income of any type or class and from any source is business income if it arises from transactions and activity occurring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is "business income" or "nonbusiness income" is the indentification of the transactions and activity which are the elements of a particular trade or business. In general all transactions and activities of the taxpayer which are dependent upon or contribute to the operations of the taxpayer's economic enterprise as a whole constitute the taxpayer's trade or business and will be transactions and activity arising in the regular course of, and will constitute integral parts of, a trade or business.

The foregoing is a general definition of what constitutes the unitary income of a unitary trade or business as developed by judicial precedent.

[19]These cases generally hold that income under UDITPA is business income subject to apportionment if the properties and the income derived therefrom constitute part of the unitary trade or business (the subject matter of the apportionment) which is carried on in part by the taxpayer in the taxing state. *Sperry & Hutchinson Co. v. Department of Revenue,* 270 Or. 329, 527 P.2d 729 (1974); *Montana Department of Revenue v. American Smelting & Refining Company,* 567 P.2d 901 (Mont., 1977); *Albany International v. Halperin,* 388 A2d. 902 (1978); *American Smelting & Refining Company v. Idaho State Tax Commission,* 592 P.2d 39 (Idaho, 1979); and *Qualls v. Montgomery Ward & Co., Inc.,* Supreme Court of Arkansas, Docket No. 78-35 (Dec'd July 2, 1979).

Cf. *Appeal of Capital Southwest Corporation,* C.C.H. California State Tax Report, §204881 (1973); *Commonwealth v. Emhart Corporation,* 443 Pa. 397, 278 A.2d 916 (1971), cert. denied 404 U.S. 981; *Commonwealth v. Tube City Iron & Metal Co.,* 432 Pa. 600, 248 A.2d 225 (1968); *Johns-Manville Products Corp. v. Comm. of Rev. Adm.,* 343 A.2d 221 (N.H. 1975); *International Harvester v. Department of Taxation,* 332 U.S. 435 (1944); *Wisconsin v. J.C. Penney Co.,* 311 U.S. 435 (1940); *Great Lakes Pipeline Co. v. Commissioner of Taxation,* 272 Minn. 403, 138 N.W.2d 612 (1965), appeal dismissed 384 U.S. 718 (1966); *Montgomery Ward & Co., Inc. v. Commissioner of Taxation,* 276 Minn. 479, 151 N.W. 2d 294 (1967); *F. W. Woolworth Co. v. Director of Division of Taxation,* 45 N.J. 466, 213 A.2d 1 (1965); *Gulf Oil Corp. v. Morrison,* 120 Vt. 324, 141 A.2d 671 (1958); *F. W. Woolworth Co. v. Commissioner of Taxes,* 130 Vt. 544, 298 A.2d 839 (1972); *Appeal of W. J. Voit Rubber Co.,* May 1947 C.C.H. Cal. Tax Rep. §202-435; and *In Re Goodyear Tire & Rubber Co. Corporate Income Tax 1966, 1967, 1968,* 133 Vt. 132, 335 A.2d 310 (1975).

VI. CONCLUSION

Inasmuch as the decisions of this Court applying the unit rule or the unitary concept have consistently upheld the inclusion of the unitary properties or income of the taxpayer in the tax base subject to apportionment, and inasmuch as this Court has upheld the validity of the general three-factor apportionment formula used in UDITPA, and inasmuch as the apportionment result is deemed to be constitutional unless shown by cogent and convincing evidence to tax extraterritorial values, it is clear that ASARCO has presented no substantial federal question for disposition by this Court.[20]

WHEREFORE, it is respectfully submitted that this Court should dismiss the appeal for lack of a substantial federal question; or, alternatively, affirm without further argument the judgment and decision of the Idaho Supreme Court.

Respectfully submitted,

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[20]ASARCO, without any factual substantiation and contrary to the way it reported its income to Idaho and contrary to the express factual findings of the Idaho Supreme Court, bases its constitutional arguments on the proposition that its stock "investments," and loans from which it derived dividend, interest and capital gains income, were properties which it did not utilize in its unitary trade or business. Thus, in substance, it asks this Court to reverse the factual questions resolved by the Idaho Supreme Court in determining what income of ASARCO in question constituted business income and in detemining whether ASARCO had established by clear and cogent evidence that the apportionment results were invalid.

In addition, ASARCO predicates its arguments on various invalid assumptions which include:

1. The assumption that the inclusion of an item of income in an income base subject to apportionment constitutes an income tax on that item of income. This, of course, is not true. Apart from the application of an apportionment formula, this Court has recognized the constitutional difference between a tax on net income and a tax on gross receipts. *U.S. Glue Co. v. Oak Creek,* 247 U.S. 32 (1917); *Peck & Co. v. Lowe,* 247 U.S. 165 (1917). "Net income" is an abstract concept resulting from a host of operational events which take place within an arbitrary time frame — the tax year. When "net income" is further broken down by application of an apportionment formula to arrive at "net taxable income" under any state law, no item of income or expense can be identified in "net taxable income."

2. The assumption that dividends and interest and other income from intangibles are attributable to the underlying business activities or the domicile of the payors rather than to the business activities of the payees. Based on this assumption, ASARCO argues that the dividends from its "foreign subsidiaries" constitutes "foreign source" income. However, dividend income (as also argued by ASARCO) is attributable to its stock ownership. This follows from the single proposition that a stockholder is a distinct taxable entity apart from the corporation. *Moline Properties, Inc. v. Commissioner,* 319 U.S. 436 (1943). Since we are here concerned with only domestic income of domestic corporations which is includable in federal taxable income, it is obvious that *Japan Lines Ltd. v. County of Los Angeles,* 44 USLW 4477(decided April 30, 1979) has no application.

3. The assumption that all the business it conducted in Idaho was the operation of its mines when in fact it conducted extensive exploration and development activities. (Rptr. Tr., pp. 146-147)

4. The assumption that the commercial domicile has a special constitutional right to tax all of the income from intangible properties. ASARCO has cited no facts and there is none in the record to support this novel proposition. Also, it has cited no decision of this Court and to our knowledge none exists to support this assumption. In regard to the basic issues and considerations involved in such an assumption, see Dexter, "Taxation of Income from Intangibles of Multistate-Multinational Corporations" 29 Vand. L. Rev. 401 (1976). Even in the context of *ad valorem* property taxation as applied to movable tangible properties of interstate and international commerce, this Court in *Japan Line, supra,* rejected the domicillary (home port) rule as applied to domestic corporations. In fact, this Court's holding in *Japan Line* that the domicillary rule was applicable to state *ad valorem* property taxation of foreign owned and based instrumentalities used exclusively in international commerce was predicated on its inability to apply apportionment rules at the international level to such instrumentalities. Furthermore, this Court in *Japan Line* affirmed the principle of full apportionment to prevent undue multiple taxation of interstate commerce.

5. The assumption that the commerce clause precludes subjecting a multistate-multinational business from the risk of any duplicate taxation of a particular item of income which is includable in apportionable income. The decisions of this Court do not so hold. To the contrary, they are based on the proposition that the attribution of a unitary tax base to

a taxing state by a reasonable apportionment formula, as applied to interstate commerce, conforms to the multiple taxation restrictions of the commerce clause.

6. The assumption that it has been subject to tax by any foreign country. Nothing in the record so indicates and no such argument was advanced by ASARCO in the Idaho courts.

7. ASARCO's reliance on various tax treaties is misplaced. The United States enters into treaties to protect its citizens, residents or domestic corporations *from inappropriate taxation by foreign nations and their political subdivisions.* Treaties do not purport to determine how the United States or its political subdivisions chose to tax their own citizens, residents or domestic corporations.